station profitability since the mid-1980's "consistent with increased competition from increasing numbers of independent stations and cable systems." (OPP Paper, pp. 37-38). Many stations in small markets are currently in a loss position. (Id. at p. 36).

Falling profits in the broadcast industry do not appear to be a temporary phenomenon. The fundamental changes in the business that have occurred will not be reversed. The marketplace is not going to revert to an era of less competition. Experts in the cable industry predict that existing technology will allow the average cable system to transmit as many as 130 channels by the mid-1990's.[35] Technological advances, such as digital compression, high definition television and direct broadcast satellites, will be competitive factors in the next 5-10 years, and are likely to hasten television's decline:

> "Overall, technological developments are likely to increase competition to broadcasters...[I]f some of the new services technology will make available turn out to have a fundamental effect of the way people watch television...the potential exists for a more rapid erosion of broadcasting's share." (OPP Paper, p. 66).

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[35] Variety, October 7, 1991.

Expectations regarding the future profitability of broadcasting are reflected in how the market values broadcast assets. A recent survey demonstrated a that the asset value of broadcast stations and networks has declined substantially since 1988:

> "That the television side of the broadcasting industry is worth less today than several years ago would surprise hardly anyone. Yet observers might be surprised by the extent of the decline. Compared with several years ago, TV stations, TV networks and the barter side of syndicated programming are collectively valued at only about two-thirds of their value then, a loss of more than $10 billion." (Broadcasting magazine, August 19, 1991).

Most of the broadcast asset value decline is reflected in lower station prices. During the 1980's stations typically sold at 10 -12 times current cash flow; today sales are at 7 - 8 times cash flow. (OPP Paper, p. 40). In 1987 125 station sales were consummated with combined value of $5.4 Billion; In 1990 only 75 stations sold at a total value of $620 Million. (Wall Street Journal, May 7, 1991). The market clearly does not believe that broadcasting will ever regain the competitive status it once enjoyed.[36]

*   *   *

The foregoing description of what has happened to television viewing, revenues, costs and profits paints a picture of a business in the throes of enormous change, and facing serious competitive challenges. OPP predicts that by the end of the decade, marginal television stations in large markets will go dark, and there will also be fewer stations in small markets. Both over-the-air viewer choice and competition to cable will be reduced. OPP also forecasts that by 1999 network viewing will fall to 15% in prime time and 8% on an total-day basis for each of the three original networks. OPP believes network advertising revenues will continue to fall with audiences, making it even more difficult to sustain what the public has come to expect in terms of network program service. These predictions about broadcasting's future raise immediate and critical policy issues, as OPP's ultimate conclusions imply:

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[36] In contrast, cable systems continue to sell at multiples of 10-11 times cash flow. See, Broadcasting magazine, September 30, 1991.

> [F]or both networks and stations, the quality and distinctiveness of programming will probably...be adversely affected. The quality of local programming, comprised mostly of news and public affairs, may also decline.
>
> For those to whom cable or other multichannel services is unavailable, or who cannot afford such service...[this] loss of broadcast service would be a significant loss."
>
> (OPP Paper, pp. 157, 167)

The Commission should be deeply concerned that a two-tier video society is being created, where those who can afford to pay for television will have access to the most attractive, popular and informative programs, and those who cannot afford to pay will not. Broadcasters are not asking the Commission to "save" over-the-air television by interfering in the marketplace to give broadcasters some competitive advantage. On the other hand, it _is_ obligated to reevaluate the wisdom of its own regulations that themselves interfere in the marketplace and place broadcasters at a distinct competitive _dis_advantage.

NBC will now turn to a discussion of those regulations we urge the Commission to review and reconsider.

IV. THE COMMISSION MUST REVIEW EXPEDITIOUSLY STRUCTURAL AND BEHAVIORAL RULES WHICH LIMIT THE COMPETITIVENESS OF THE TELEVISION BROADCAST INDUSTRY

OPP believed its analysis of current and future trends in the broadcast industry had serious implications for the Commission's regulation of television. It concluded:

> "Existing broadcast regulations may prevent broadcasters from adopting more efficient forms of organization and offering services the public would value. Relaxing or eliminating such rules would allow broadcasters to compete more effectively, and would facilitate the continued provision of valued over-the-air services." (OPP Paper, Executive Summary, p. x).

Specifically, OPP recommended reconsideration and eventual elimination or modification of the following Commission rules:

- the broadcast network-cable cross ownership rule
- the dual networking rule
- restrictions on multiple station ownership and station ownership in combination with other media properties
- rules governing the network-affiliate relationship

(OPP Paper, pp. x; 170-71)

For the reasons set forth in the OPP paper, as well as those discussed below, NBC agrees that these rules are ripe for reconsideration.

A. Network Cable Cross-Ownership Rule
<u>(47 CFR §76.501(a)(1))</u>

NBC is committed to its core free over-the-air network and station broadcasting business. But, in order to maintain the strength of that business, we need the flexibility to augment our broadcasting operations through relationships with and investments in related businesses. Cable systems would be a logical investment for any of the broadcast networks, because of cable's strong synergistic relationship to their existing businesses. As Commissioner Duggan pointed out in a recent speech, an "ultimate convergence of interests ... is both desirable and inevitable for the cable and broadcasting industries."[37]

It is not in the interests of networks, their station affiliates (who need a financially strong network partner), or the public that relies on the over-the-air broadcast system to retain rules that prohibit only three companies in the world -- NBC, ABC and CBS -- from owning cable. If they are to remain strong competitors in the 1990's, networks must be given the freedom to make investments in highly related media, such as cable. Such investments ultimately will support and strengthen their ability to invest in their core broadcast

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[37] Remarks of Commissioner Ervin S. Duggan before the Broadcast Cable Financial Management Association's Annual Conference, April 22, 1991, p. 2.

businesses, benefiting both affiliates and the public. Moreover, as Commissioner Duggan noted,

> "To keep old rules written when broadcasting was the preeminent delivery system, when cable was a mere glimmer on the horizon, simply may not make sense." (Id. at p. 7)

NBC hopes this marks the final chapter in the tortured history of the Commission's reexamination of its network cable cross-ownership ban. In 1982 and again in 1988, the Commission commenced proceedings to reexamine and repeal this outdated prohibition. On both occasions, however, the Commission failed to proceed after Comments were filed, and the open Docket is still pending.[38] The long procedural history and the overwhelming record in favor of repeal already amassed over the past decade sets the stage for immediate action by the Commission to eliminate this rule. No further round of comments should be necessary.

Adopted in 1970, the network cable cross-ownership prohibition was catalyzed by the cable owners' view that

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[38] In re Amendment of Part 76, Subpart J, 76.501 of the Commission's Rules and Regulations To Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks, BC Docket 82-434.

preventing broadcast networks from owning cable systems was essential to fostering the development of the cable industry and thus enhancing program diversity. Second Report and Order in Docket No. 18379, 23 FCC2d 816, 819, 821 (1970), recon. denied, 39 FCC2d 377 (1973).[39] The Commission also based this rule on its view that the networks had

> "...a predominant position nationwide through their affiliated stations in all markets, their control of network programming in prime time, and their share of the national television audience." (Id. at p. 821).

In denying reconsideration, the Commission offered the additional rationale that the ban might, in a general way, further Commission policies favoring economic competition and competitors in the marketplace of ideas. 39 FCC2d at 391.

Today, any rationale for this restriction -- whether or not articulated in 1970 -- has completely evaporated. First, even if the assumption that the ban was a necessary

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[39] It should be noted that the Notice of Rulemaking in the proceeding that ultimately resulted in adoption of this prohibition did not propose any ban on network cable ownership. See, 39 FCC2d 377, 380 (1973). The restriction appears to have been added by the Commission as an afterthought, and without any investigation of whether such a prohibition was either necessary or likely to foster the Commission's stated goals.

"prophylactic" protection for an "infant" cable industry had any validity in 1970, it is a ridiculous premise in 1991. Second, as the foregoing description of the marketplace and the networks' competitive decline vividly illustrates, FCC regulations can no longer be justified on the grounds that the networks are "predominant," or "control" programming or audience share. Third, the Commission's hope that the rule would generally foster competition and diversity has not been realized. In fact, the rule is anticompetitive and has probably led to both a more concentrated, less efficient cable industry, and weaker network broadcast competitors.

In its pending Docket on this rule, the Commission received numerous Comments from parties who argued the legal and factual case for repeal. In addition, <u>five separate impartial government studies have called for repeal of this rule since the early 1980's</u>, all concluding that the prohibition was unnecessary and disserved the public interest:

- First, in 1980, the Commission's Network Inquiry Special Staff (NISS) concluded that the ban had no valid basis and should be repealed. The NISS determined that the rule had been adopted without notice or explanation, and that it not only failed to serve, but was actually harmful to the public interest:

> "Indeed it is difficult to see how this rule could serve any purpose but to restrain competition and diversity in the operation of cable systems."
>
> Final Report on New Television Networks: Entry, Jurisdiction, Ownership and Regulation, Vol. I at 430-31 (1980) (hereinafter "NISS Report").

- Second, in 1981, the FCC's Office of Plans and Policy released a study which concluded that there was no reason to continue the network cable cross-ownership ban, and that network ownership of cable could provide increased efficiency and lower costs. OPP agreed with the NISS that the ban had negative competitive effects with no countervailing benefits. Staff Report, FCC Policy on Cable Ownership, (November 17, 1981), pp. 107, 109-10, 124-25.

- Third, commenting on the OPP study in the 1988 round of filings in the pending network cable cross-ownership rulemaking, the Department of Justice also concluded that the rule had no basis in competition policy and should be repealed. (Comments of the Department of Justice, January 21, 1982 and November 29, 1982). The DOJ stated:

> "We believe that the possibility of economic harm resulting from a vertical relationship between television networks and cable systems is too remote to justify continuation of a flat ban on network/cable cross-ownership." (Comments of the Department of Justice, November 29, 1982 at 2).

- Fourth, in 1988, The National Telecommunications and Information Administration completed a comprehensive study of the cable industry and the policy and regulatory issues affecting that industry. Video Program Distribution and Cable Television: Current Policy Issues and Recommendations, NTIA Report 88-233 (June 1988). The NTIA's report recommended, among other things, the repeal of the network cable cross-ownership rule. NTIA concluded that the bases for the rule "cannot withstand empirical or theoretical analysis," and that repeal was required "to improve on the levels of competition and diversity in video programming distribution in the future." (Id. at 72, 126).

- Fifth and finally, this year the OPP renewed its call for repeal of the network cable cross-ownership rule, stating that it prevented the efficient use of programming and other resources, and placed broadcast networks under a competitive handicap in today's marketplace. (OPP Paper, pp. 170-71).

The Commission should at long last eliminate the network cable cross-ownership rule. The NISS, OPP, the Department of Justice and the NTIA have been urging repeal for over a decade. The data and analyses in the record already before the Commission, and on which these impartial government bodies relied, is compelling and fully supports repeal. The countervailing arguments have been refuted in filings the Commission has already received and are without merit.

B. The Dual Network Rule (47 CFR §73.658(g))

The Dual Network Rule traces its origins to the early 1940's and the Commission's adoption of the so-called Chain Broadcasting regulations. The 1941 Chain Broadcasting Rules were designed to eliminate certain contractual and other arrangements between radio networks and their affiliates which the Commission believed gave the networks undue control over local stations. The Rules also prohibited dual networking, based on the Commission's finding that the simultaneous operation of two radio networks had enabled NBC under then-existing market conditions to keep competition to a minimum. The Dual Network Rule was extended to television in the mid-1940's without significant discussion.

There were no significant changes in the Dual Network Rule until 1977, when the Commission repealed the rule with respect to radio.[40] As its grounds for eliminating the rule, the Commission cited the radical change in the marketplace that had occurred in the nearly 40 years since the Chain Broadcasting Rules were adopted. Specifically, the Commission relied on the enormous increase in the number of radio stations, and the diminished importance of networks to stations in a world where there are myriad program sources available. The Commission noted that by the late 1970's the only effect of this rule on the radio business was to deprive stations, and ultimately listeners, of a wider variety of program choice.

These same considerations should compel the Commission to reexamine the need for a dual networking restriction in television. Clearly, the number of television stations has exploded, not only since the advent of the medium in the mid-1940's, but even in the past decade. The sources of programming available to television stations and viewers -- once essentially limited to the three national networks -- now

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[40] Report, Statement of Policy and Order In re Review of Commission Rules and Regulatory Policies Concerning Network Broadcast by Standard (AM) and FM Broadcast Stations, 63 FCC2d 674 (1977).

include dozens of syndicators and occasional networks that compete with the original networks for access to station air time.

The viewer at home also has dozens of national cable services to choose from. In fact, cable programmers take advantage of the absence of any dual network restrictions on their industry and often operate several commonly-owned cable networks.[41] The ability to own and operate several networks provides cable programmers with efficiencies and economies that are not available to broadcast networks. The result is that broadcast network service may, over time, become less diverse and less competitive.

As the Commission's Network Inquiry Special Staff noted over a decade ago, the present-day consequences of the Dual Network Rule may disserve public interest goals:

> "...any ban on dual networking achieved by internal firm expansion may serve only to reduce unnecessarily the diversity and quality of network services by reducing competition and efficiency." (NISS Report, supra, Vol. I, p. 370).

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41 For example, Turner Broadcasting System owns CNN, CNN-Headline, WTBS and TNT. Viacom owns Showtime, The Movie Channel, Nickelodeon, MTV, Lifetime, CTV: The Comedy Network and VH-1.

The Rule may also prevent networks and their existing affiliates from structuring mutually advantageous arrangements under changed technological or regulatory circumstances. For example, signal compression technology may enable each local station to transmit more than one channel of programming to the home. But the Dual Network Rule may prevent that station's network from supplying it with a news service or other desirable programming to put on those additional channels. If the duopoly rule is modified, network affiliates may own additional stations in their markets. As noted below, such common ownership has the potential of increasing the amount of news and informational programming available in local markets.[42] But the existing broadcast networks could not provide a national or international news service to those stations under the current rule.

This 50 year old ban has clearly outlived its justification and its utility, and should accordingly be lifted.

C. Restrictions On Station Ownership

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42 See p. 62, *infra*.

1. The Multiple Ownership Rules (47 CFR §73.3555)

The genesis of the multiple ownership rules dates back to 1940, when the Commission first restricted the number of FM stations a single entity could own.[43] By 1953, the Commission had adopted national ownership caps for all three broadcast services -- the so-called "Seven Station Rule", which limited a single entity to no more than seven stations in each service.[44] The Commission stated that the purpose of the rule was to further its policy of "diversification of program service viewpoints" and to "prevent any undue concentration of economic power."[45]

In a rulemaking commenced in 1983, the Commission reevaluated and ultimately relaxed the Seven Station Rule to the 12 station/25% TV households limit in effect today.[46] The case for total repeal of the multiple ownership restrictions

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[43] Rules Governing High Frequency Broadcast Stations, 5 FR 2383 (1940).

[44] 18 FCC 288 (1953).

[45] Id. at 292-93.

[46] Report and Order in Docket 83-1009, 100 FCC2d 17 (1984).

was so strong in 1983 that, initially, the Commission decided to completely sunset the modified rule by 1990. However, on reconsideration, the Commission decided not to adopt an automatic sunset, noting that it preferred to proceed more cautiously when relaxing long-standing regulations.[47]

The Commission has now had ample opportunity to see how relaxation of the multiple ownership rules has affected diversity and concentration of economic power. Diversity has flourished and the broadcast industry is more fiercely competitive than ever. The record before the Commission on the state of the marketplace, the efficacy of the multiple ownership rules in achieving the Commission's stated regulatory objectives and the experience since the rule was relaxed in 1984[48] all point inexorably toward relaxation or

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[47] 100 FCC2d 74, 96-97 (1985).

[48] Currently only one television group owner even approaches the 25% TV household limit (CapCities/ABC: 8 stations and 24.6% coverage). But CapCities/ABC's level of coverage is virtually the same as ABC's was in 1983. CBS is the next largest group owner with 7 stations and 22.7% coverage. However, in 1983 CBS' coverage was higher -- 24.1%. The stations of third-ranked NBC similarly cover less of the country today than its complement of stations in 1983. (Paul Kagan, Broadcast Investor, July 31, 1991, p. 7). Thus group owners have hardly gone on a station buying spree since the rules were relaxed, and, in fact, only one owner approaches the current limit. This proves the accuracy of the

elimination of these restrictions.

The Commission based its 1984 decision to relax the Seven Station Rule on the following factors:

First, the enormous transformation in the nature and scope of broadcasting since the adoption of the rule. Here the Commission cited the explosive growth in the mass media market, which had eliminated any threat of either economic control[49] or paucity of viewpoints;

Second, the questionable relevancy of a national cap to the goals of providing diverse program sources and viewpoints to individual consumers in local markets;

Commission's view when the Seven Station Rule was relaxed:

> "...broadcasting [cannot be distinguished] in any practical sense from other businesses...for which resources are limited or the available economic base constrains the number of firms that can successfully participate in the market...[B]ecause broadcast stations can be purchased, typically the only genuine barrier to entry into broadcasting is insufficient capital..." 56 RR2d at 860.

[49] The Department of Justice concluded in the Commission's 1983 proceeding that "elimination of the Seven Station Rules will raise little risk of adverse competitive effects in any market." Comments of the U.S. Department of Justice in Docket No. 83-1009, pp. 2-3.

Third, the impact of the rule on broadcasters' ability to take advantage of efficiencies and economies of scale that might help promote diverse and independent programming.

These factors are even more compelling today than in 1984. The choices available to individual viewers from both national and local program sources continue to proliferate, rising from 10 channels per average home in 1983 to 33 per average home today. A national station ownership cap is even more unnecessary and irrelevant to the scope and breadth of consumer choice, competition and diversity in 1991 than it was seven years ago. The only present effect of this ownership limit is to hinder the competitive potential of broadcasters, to the detriment of the public. As OPP stated:

> "In today's market...common ownership of larger numbers of broadcast stations nationwide...may permit exploitation of economies of scale and reduce costs or permit improved service." (OPP Paper, p. 170).

NBC urges the Commission to reexamine the need for and efficacy of its multiple ownership rules. We believe it will be clear from the record that either the Commission's initial view in 1984 -- that these rules could be completely eliminated by the 1990's -- or at the very least a marked relaxation will prove to be the outcome that best serves the public interest.

2. Duopoly and One-To-A-Market Rules (47 CFR §73.636(a)(1)

Like the multiple ownership rules, the Commission's duopoly and one-to-a-market rules were adopted to promote the twin goals of fostering diversity of viewpoints and preventing undue concentrations of economic power. And, like the multiple ownership rules, these ownership restrictions are both unnecessary and counterproductive in the 1990's marketplace.

The duopoly rule, which prohibits ownership of more than one station in the same broadcast service in a single market, was first codified in the early 1940's.[50] The one-to-a-market rule, which in its present form prohibits combinations of VHF television stations and radio outlets located in the same market, was not adopted until 1970.[51] This more recent regulation has been characterized by the Commission as an

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[50] <u>Multiple Ownership of Standard Broadcast Stations</u>, 8 FR 16065 (1943), p. 307.

[51] <u>First Report and Order</u>, 22 FCC2d 306 (1970).

"extension" of its duopoly rules.[52]

In 1989, the Commission significantly relaxed the duopoly rule for radio broadcasters.[53] Just as when it relaxed its multiple ownership rules five years earlier, the Commission determined that changes in the marketplace -- including a dramatic increase in the number of stations, new services and technologies, and an abundance of competition -- had reduced the need for such restrictions. In addition, the Commission cited the benefits of common ownership, such as economies of scale and cost savings, that could lead to new, expanded and more diverse radio program services.

The changes and policy considerations that led the Commission to reexamine and modify its ownership rules in the radio context apply today with equal force to the television industry. And these considerations have implications not only for the television duopoly restrictions, but for the one-to-a-market rule which forbids VHF/radio combinations.

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[52] Id. at 307.

[53] First Report and Order in MM Docket 87-7, 4 FCC Rcd 1723 (1989).

Elimination of these restrictions would provide local stations with cost savings and economies that could be translated into more diverse, higher quality programming. In many markets, the local television broadcaster might use its second outlet to more fully utilize its local newsgathering and programming resources, resulting in an increase of local informational programs. In fact, the track record of commonly owned stations demonstrates that they tend to lead the industry in news and public affairs service. In its 1983 multiple ownership proceeding, the Commission determined that group-owned stations typically provided their viewers with more news, public affairs and community service programming than individually owned stations. Therefore it based its relaxation of the multiple ownership rules in part on the conclusion that "the availability of more ... group owned stations might enhance the information and entertainment markets by increasing the amount of local news and public affairs programming."[54] This rationale is equally applicable to any relaxation of the duopoly and one-to-a-market restrictions.

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54 Report and Order in Docket 83-1009, supra, 100 FCC2d at [par 44-51, 51].

NBC joins OPP in recommending that the Commission reexamine the continued need for and impact of these ownership regulations.

D. Rules Affecting The Network-Affiliate Relationship - "Option Time" (§73.658(d))

Several Commission rules govern the relationship between a television network and its affiliated stations in an attempt to address the Commission's concern that networks have the ability to unduly restrict affiliate programming choices. Like the Dual Network Rule, these restrictions date back to the Chain Broadcasting report and reflect the marketplace of the late 1930's. They include the prohibition against so-called "option time" (§73.658(d)). In 1977, in the same proceeding which eliminated the Dual Network Rule for radio, the Commission repealed this and other network-affiliate regulations in the radio context, citing dramatic marketplace changes.[55]

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55 Report, Statement of Policy and Order, supra, 63 FCC2d at 677-79. Only one radio network rule was left in place: §73.232 (territorial exclusivity).

The abiding restrictions on the terms of television network affiliations are predicated on assumptions about network "power" and "control" over affiliates that have no basis or relevance in the 1990's marketplace. In particular, networks should be able freely to make market-based arrangements to have their programs cleared by their affiliated stations in the Top 50 markets, most of which are group-owned. Affiliate group owners are typically large corporations that own stations in many markets and are affiliated with more than one national network. It is ridiculous to assume that NBC or either of its counterparts has the power to control or unduly influence the program choices of these powerful station owners.

It has long been the case that clearance in the Top 50 markets is critical to the ultimate success of any nationally distributed broadcast program. Affiliates in those markets today have a number of program choices -- not only the offerings of their network, but of nationally syndicated programs and occasional networks. But while these other national program services can negotiate market-based terms for the carriage of their programs in the largest markets, the three original networks are limited by the "option time" regulation. Today this restriction interferes with the ability of networks and their affiliates in the Top 50 markets to construct the same arm's length, market-based business arrangements that are available to and utilized by other suppliers. This places the broadcast networks at a distinct competitive disadvantage in their efforts to launch new programs and maintain audience levels.[56]

In 1980, the Network Inquiry Special Staff carefully reviewed the Commission's network-affiliate regulations and concluded that they "have had little effect in promoting the Commission's policy objectives of competition, diversity, and (except by chance) localism."[57] The NISS also noted that the appearance of new networks and broadcast outlets should substantially reduce the concerns which led the Commission to adopt these rules initially, as the Commission recognized when it repealed the rules for radio networks. (Id. at 491). The Commission today confronts a marketplace in which a fourth network has been successfully launched, first-run syndication continues to grow and the number of commercial stations has

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[56] NBC is not proposing any change in Section 73.658(e) of the Commission's rules, which preserves each affiliated station's right to reject network programs which the station reasonably believes to be unsuitable, unsatisfactory or contrary to the public interest, and its right to substitute for a network program another program which, in the station's opinion, is of greater local or national importance.

[57] NISS Report, supra, Vol. I, p. 488.